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Aviation White Paper Branch
Domestic Aviation & Reform Division
Department of Infrastructure, Transport, Regional Development,
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Dear Mr. Dymowski

Re: Terms of Reference for the Australian Aviation White Paper 2023

The City of Kingston (**Council**) welcomes the opportunity to make a submission on the Terms of Reference (TOR) for the Australian Government's Aviation White Paper. Council understands that the White Paper will explore the likely future trends in aviation over the period to 2050 and articulate long-term policy directions to set the scene for the next generation of growth and innovation in the aviation sector to promote an efficient, safe, sustainable and competitive Australian aviation sector which is critical to the economy and standard of living of all Australians. The four specific areas identified by the Government upon the announcement of the White Paper are as follows:

1. *How to maximise the aviation sector's contribution to achieving net zero carbon emissions, including through sustainable aviation fuel and emerging technologies*
2. *The economic reforms needed to improve productivity across the sector, including addressing skills shortages, competition between airports and airlines, and charting a course out of the pandemic*
3. *How to support and regenerate Australia's general aviation sector*
4. *Better mechanisms for consultation on and management of issues like aircraft noise, airport development planning and changing security requirements.*

The themes announced include:

- *aviation's role in economic development, trade and the visitor economy – general, domestic, regional and international aviation;*
- *how to maximise the aviation sector's contribution to achieving net zero carbon emissions including through sustainable aviation fuel and emerging technologies;*
- *changing aviation technologies and ways to position our policies, regulations and systems to encourage uptake and manufacturing of new, more efficient, transport technologies;*
- *airport development planning processes and consultation mechanisms that consider the impact and changing nature of aircraft noise and related expectations on the role of noise sharing and noise mitigation;*
- *how to support and regenerate Australia's general aviation sector;*

- *future industry workforce skills and training requirements;*
- *appropriate consumer protections and access to services;*
- *maintaining fit-for-purpose aviation safety, air navigation and aviation security systems and service delivery agencies;*
- *the role of airlines and airports in supporting regional economies; and*
- *other significant issues raised during the consultation process.*

Context

We understand our submission will assist to inform the development of the Green Paper, due to be released in mid-2023. By way of introduction the City of Kingston is located in the southeast of Melbourne. Within the centre of the municipality is Moorabbin Airport, a 294-hectare parcel of land owned by the Commonwealth Government, 21 kilometres southeast of the Melbourne CBD. Moorabbin Airport, is a general aviation airport and is recognised as one of the nation's busiest airports due to many flight movements being related to pilot training, which results in concentrated aircraft activity in the vicinity of the airport. Aircraft movements are approximately 295,000 each year.

The airport is operated by Moorabbin Airport Corporation (MAC), a private company and the Airport Lessee Company (ALC), was in 1998 was granted a 50-year lease with a 49-year renewal option. The Airport land has since deregulation, formed a significant non-aviation commercial centre and progressively compromised its potential for future expansion in terms of aviation.

Council has repeatedly raised the inconsistencies between the lands legislative requirements to function as an Airport as required by the Airports Act 1996, whilst it continues to pursue expansive non-aviation development.

Council have made numerous submissions to the Commonwealth Government during both the course of the draft Moorabbin Airport masterplan process (particularly concentrated for the draft masterplan 2021 process but have consistently made submissions over the past three (3) masterplans) and to the Senate's Rural and Regional Affairs and Transport Legislation Committee in December 2021 on the current state of Australia's general aviation industry.

Our Councils highest focus is around the theme '*how to support and regenerate Australia's general aviation sector*' and the preliminary feedback we wish to provide is as follows:

1) Time frame

Council understands that the White Paper will '*explore the likely future trends in aviation over the period to 2050*'. We say in the first instance that the White Paper should consider a longer time frame, consistent with the maximum term of the leases for federally owned aviation assets.

2) General Aviation

With respect to the TOR comment '*how to support and regenerate Australia's general aviation sector*', Council submit that the TOR must acknowledge that there are fundamental challenges and highly unique differences between major airports / commercial air transport services and 'general aviation' (historically commonly referred to as secondary airports).

The International Civil Aviation Organisation (ICAO) classifies 'general aviation' as covering a range of operations that are not commercial air transport services (major airports, airline businesses (e.g. Qantas), regional express and cargo). General aviation relates to small and medium aviation and encompasses but is not limited to the following:

Private aviation, sport and recreational aviation, private aviation for businesses (such as single engine) across Australia (very commonly found for regional and rural areas). Airport maintenance companies, flying schools, charter businesses for hire, multitude aerial photography, survey and mapping work, agriculture, aerial firefighting and search and rescue.

Many of the above are found at Moorabbin Airport. The vulnerability shown by supply chains in the past twelve months across Australia has highlighted how critical the general aviation industry is to Australia, particularly around the impacts upon regional Australia. Commercial air transport services and our major airports cannot operate without the general aviation industry.

Australian airlines are facing a global skills shortage of pilots and other critical employees within the aviation industry. We are currently in a situation where we can proactively protect this critical component of our aviation industry at a regional and rural level and as such, we say that general aviation airports are critical national infrastructure assets and need to be recognised and protected as such by legislation.

These assets must be protected and allowed to grow and not be constrained by non-aviation development. Council have argued previously that we are at a tipping point, much like the car industry was before it moved offshore. We have a unique opportunity, and an obligation to future generations to safeguard these important and irreplaceable aviation assets before it's too late.

General aviation airports and operations differ significantly from that of Australia's primary capital city airports. For example, retail use at a primary or 'major' airport, is a secondary use. Users attending these airports are there to utilise aviation as their primary purpose. Retail is secondary. A key decision early in the *Airports Act 1996* commencement, has had a significant impact upon general aviation airports across Australia, not just at Moorabbin. This decision is *Westfield Management Ltd v Brisbane Airport Corporation [2005] FCA 32*. This decision, in 2005 was about the nature and extent of commercial development permitted under the *Airports Act* on land at Brisbane Airport. The outcome of this decision was to allow non-aviation development at Brisbane Airport, one of Australia's major airports. However, as the legislation does not differentiate between general aviation and major airports, the impact of this decision has had a devastating consequence at general aviation assets across Australia and allowed nonaviation development to occur at a rapid speed to the detriment of aviation. The detriment extends well beyond the airport, as planning seemingly occurs at Airports on Commonwealth Land in a manner that would never be allowed to occur off airport land given the implications on established retail hierarchies and embedded activity centre planning.

This is one of our fundamental concerns with the legislative framework (both the Act and Regulations). The TOR must address that general aviation need to be recognised by legislation and policy and separated out as a way

of future proofing this asset to deliver productivity growth within the industry, connect communities and deliver both economic and social returns.

3) Legislative issues- *The Airports Act 1996 and Airports Regulations 1997*

The *Airports Act 1996* (the Act) and associated Regulations (Regulation) sets out the regulatory arrangements between airports formerly owned and operated on behalf of the Commonwealth by the then Federal Airports Corporation (FAC). It requires, as set out in Part 1, Section 3 that airports “*promote sound development of civil aviation in Australia*”. The Moorabbin Airport is also subject to Part 5 of the Act and the corresponding regulations. As per Part 5, ‘*Obligation to use airport site as an airport*’. The Airport is declared to be an airport site within the meaning of Section 5 of the Act and Regulations.

The legislation that underpins the role of the Airport clearly seeks to ensure that an efficient and fully functioning airport is provided, which gives priority to its core aviation function. Council is strongly of the view that the intentions of the Commonwealth Parliament in introducing the Airports Act was not to bring about any ‘erosion’ of opportunity but was seeking to protect and critically grow General Aviation. As discussed above, this has not occurred nor has the long-term strategic aviation context ever been robustly considered. Therefore, it naturally stands to submit that there is a strong argument to state the Act has serious deficiencies and is poorly drafted for General Aviation in the 21st century, and in a post pandemic time. Council submit that the Act is no longer doing the job it set out to do, something that must be reconciled through the White Paper to ensure appropriate legislative responses.

There are unique differing challenges facing the aviation industry across Australia. Major, large, regional and remote airports and aerodromes must be recognised and protected for our future generations. Addressing this through the legislation will assist in providing long term certainty to the aviation sector to make it right for generations to come.

Draft Masterplan process legislative process.

The masterplan process as set out under Division 3 in Part 5 under the *Airports Act 1996* needs to be urgently reviewed. As Council have stated, there appears to be a significant number of deficiencies within the Act. A legislative review of this section with general aviation in mind should be completed. Now that the Commonwealth have refused a draft masterplan (Moorabbin Airport) there is a live case study to determine the areas of weaknesses in the Act.

Council contends that significant improvements are needed to be made to ensure that state and local planning requirements are recognised and adhered to for future considerations regarding airport master planning. The draft masterplan process should be open and transparent and subject to robust critique as would be the case in alternative planning jurisdictions. Following Councils experience with the draft Moorabbin Airport masterplan and the ultimate refusal by the then Deputy Prime Minister, Barnaby Joyce, this has exposed a number of weaknesses and frustrations around the Act. Areas of concern that we believe the White Paper must address are as follows:

- Should a masterplan be refused, then reasons for refusal must be publicly available.

- Does the Act create an opportunity for a Minister, in refusing a draft master plan, to be able to require specific changes to the resubmitted master plan given this Commonwealth land under a Commonwealth lease? For example, does the power exist for a Minister to formally change the planning parameters that had prevailed under a previous master plan? In all other planning jurisdictions, State / Territory Planning Ministers routinely change planning provisions to create amended requirements to address emerging policy needs.
- A process of robust review which in the Victorian Planning system would be a Planning Panel, must be established to test 'new initiatives' put forward in airport planning that have no relationship to aviation.
- The document submitted to the Minister should be available (consistent with local planning practices in Victoria).
- The supplementary report on submissions, required by the ALC which shows their regard to submissions should be publicly available (consistent with planning practices in Victoria).
- Meaningful and constructive engagement is imperative.
- Aviation infrastructure requirements should be clearly established (built into the Act). An explicit capital works renewal program which provides for clear commitments to ongoing investment for all forms of aviation infrastructure should be documented in a similar way a Council derives rates to fund a capital program an airport lessee company derives 'significant rental' to 'reinvest' into aviation.
- A Practice Note or further guidance should be provided by the Commonwealth that clearly outlines the expectations around the master plan and major development plan process.
- Future needs are provided for not just for the length of the masterplan but for the length of the lease agreement.
- Minimum standards (such as setbacks, heights to allow for a respectful transition) to be introduced for airport sites abutting an existing residential area.
- Clear and specific design guidelines and performance measures applicable to all development abutting sensitive residential interfaces.

As we've stated previously, developments (non-aviation) can completely disregard existing residential neighbours and provide serious negative amenity outcomes with no checks or balances available. The ALC can declare that they comply with State and Local planning provisions, but who provides that oversight that they do in fact comply? Council can demonstrate that in the instance of Moorabbin Airport outcomes that would not be permitted in other locations are routinely occurring to the detriment of the immediately adjacent community. Parity in planning practise is critical particularly when what is being exploited is in fact Commonwealth owned land.

The substantive and clearly disproportionate investment that has occurred in non-aviation development with limited investment in any strategic and operational improvements to the aviation role of the airport must be robustly reviewed. Changes to the Act and Regulations must be modified to correct this clear imbalance that continues to occur without any meaningful regulatory oversight.

Airport Building Controller (ABC)

There are fundamental concerns with regards to this section of the Act. The role of the Airport Lessee Company (ALC) within the building approval process remains concerning with regards to development that occurs on their

subject site. In many instances they wear the hat of the applicant, regulator and financial beneficiary of decisions made on land use planning. An understanding of this conflict of interest should be addressed.

The consent of the ALC is required before any approval can be given by the ABC whose appointment is not made at arm's length from the ALC. The ALC will review all applications to ensure that the proposal is consistent with the airport master plan, to ensure the development is consistent with its planning objectives and to assess the impact of the proposal on infrastructure and the operations of the airport. The ALC also has the power to impose appropriate conditions on building activities yet are the applicant for developments on site.

These are fundamental concerns which raise a number of questions. The White Paper should address the manner in which ABCs and ALCs interact. It is imperative that there is independent oversight of this process and that this is done in a transparent manner. As it stands, under the Act and Regulations, should one wish to inform themselves of a decision made by an ABC, the ABC as of right, can declare that certain documents are made confidential therefore inhibiting an open transparent process (as stated below) under 4.03 of the Regs.

4.03 Confidential information in hands of airport building controller

Information given to, or obtained by, an airport building controller in the performance of a power or function under these Regulations must not be disclosed to any person who does not have a lawful, and proper, need to see the information.

There are a series of questions that Council think should be investigated through the White Paper process including:

- Who appoints and funds the Airport Building Controller and what expertise must they possess?
- Who pays the Airport Building Controller?
- Who is the Airport Building Controller required to consult with when making decisions?
- Are the Airport Building Controllers decisions of a significant nature subject to review, appeal or Departmental oversight when concerns may be raised?
- Who assists the Airport Building Controller if they wish to query a technical issue that may impact on Aviation safety?
- If the Airport Building Controller is asked to make a decision regarding a land use matter, are they required to consider whether it may fall within a matter that would trigger a Major Airport Development (eg. Section 89 (na))?
- If the Airport Building Controller is not required to determine whether a land use proposal meets the definition of a Major Development Plan, who is the appropriate entity to make this decision?

Major Development Plan

Major Development Plans (MDP) as addressed in Division 4 of Part 5 of the Airports Act 1996, again, much like the previous sections, Council believes this section of the Act needs to be reviewed. There are issues with the objective and impartial interpretation of the role played by this part of the Act. For example, under s89(1)(e) and (na), a major airport development is *'a development that is carried out (on) an airport and that consists of...constructing a new building, where...the building is not wholly or principally for use as a passenger terminal, and the cost of construction exceeds \$25 million...or a development of a kind that is likely to have a significant impact on the local or regional community'* (emphasis added).

- What is meant by *significant impact*?
- Council suggests that thought be given to ensuring that for general aviation airports, any departure from an approved plan should trigger a requirement for a major development plan OR the matter is tested through the next master planning process.
- The financial amount of \$25 million to be reassessed and oversight provided. Who checks this?

There is a place for the MDP process to be utilised further, but a detailed and meaningful assessment on an outcome which has a *significant impact on the local community* must be robustly scrutinised.

4) Management of Federally Leased Airports.

As part of the legislative review of the Act and Regulations stated earlier, this should go hand in hand with a focused and in-depth review regarding the management of federally leased airports, as part of the White Paper process. It is recommended that this review use case studies, such as Moorabbin, which illustrate the rapid depletion of aviation activity on airport land to expedite non-aviation development at these Government owned General Aviation assets. The level of technical oversight that has occurred in appraising decisions on Commonwealth land must be addressed. Furthermore, the role of the regulator needs to be addressed. As the Regulator they are the 'expert' that Local and State Government can rely on for information pertaining to safeguarding airports and ensuring alignment with broader planning policies.

Council believes that in the case of Moorabbin Airport, the ALC has failed in its legislative requirement to ensure that an efficient and fully functioning airport ensues through the very long lease terms which are afforded. What has seemingly been created is an otherwise unprecedented situation where airport leaseholders are able to hold unique and what we believe are often unregulated monopoly powers which negatively impact the aviation industry and sidestep State and Local planning powers with little to no oversight. As mentioned in an earlier section on Airport Building Controllers, this is an example of where there appears to be very little independent oversight by the regulator.

Council in its role within local government, are actively trying to protect and safeguard the aviation industry by way of what occurs around airports, yet significant development (non-aviation) can occur seemingly unabated on airport land. Council can provide multiple examples where we believe there to be different treatments on site and off site (on sites located within the municipality).

A recent decision of the Victorian Civil and Administrative Tribunal (VCAT) was issued on 30 December 2022, by Senior Member Bennett (VCAT reference P457/2022). This decision relating to a site at 252 Lower Dandenong Road, Mordialloc (opposite Moorabbin airport) involved a proposal for a Convenience Restaurant and Service Station which was refused by Council based on amenity related issues and safety concerns raised by the ALC. Ultimately the VCAT also refused the grant of a permit based on an unacceptable safety risk, due to the increase in activity on the site proximate to the airport. As part of the hearing, the ALC were required to provide on a map the Public Safety Area (PSA). When the State Planning Tribunal of Victoria can refuse a land use immediately adjacent to the airport concluding that '*Controlling the number of people on the ground by limiting development in the area at the end of a runway is a clear priority to aviation authorities and is a laudable approach deserving support in this application*', how can a different approach to be applied by the ALC on Commonwealth Land? As illustrated in the two images below,

the PSA areas and airport runways are in fact often closer to commercial warehouses very recently built on the airport land when compared with the private land parcel assessed by the VCAT.



The ALC's role in this VCAT proceeding as reinforced in the Senior Members comments, reinforces the inherent tension that exists between the roles it currently holds with respect to planning on and around Moorabbin Airport and how decisions are made. The government agencies which control and ultimately regulate this critical aviation infrastructure, planning and safety must be looked at.

Council submit that the White Paper has an opportunity to provide an objective assessment around this tension particularly around the evolution of the non-aviation development particularly where it has occurred in very close proximity to aviation infrastructure and how these have come to fruition.

If the legislation is deficient as we put forward, it makes it terribly difficult for the 'Regulator' and other agencies to do their job and in turn diminishes the effectiveness and operation of the Regulator and aviation agencies.

As it stands currently, the Commonwealth Department are currently the 'referral authority' for the City of Kingston with respect to decisions made around the airport which are impacted by particularly planning overlays pertaining to airport safeguarding. Views of the Department are required before a decision can be made. For a significant number of years, the ALC not the Department have performed this role as the 'referral authority'. Council contends that it is inappropriate for a private company (ALC) to be making decisions on land use decisions, particularly whilst there is an inherent tension over land use decisions on and off airport sites. The Regulations are currently administered by the Commonwealth Department or an 'authorised person'. This is unclear who this pertains to, and we say that the White Paper should address this matter as what is currently occurring cannot be the appropriate intent of the Airport Regulations. At this stage it would be reasonable to state with respect of Moorabbin Airport, the Commonwealth Department or Agencies of the Government need to take a much more active role as Regulator until tensions are eased and legislation issues addressed.

The White Paper should also critically examine the degree to which developments comply with the relevant guidelines from the National Airport Safeguarding Framework in areas including obstacle limitations and windshear, with a particular focus on any variations to the technical requirements. The ATSB final report for the fatalities at the Essendon Airport must also form part of the considerations in the White Paper around Airport Safety and the role the Act and planning processes need to more effectively play.

Lease agreements- assurances for tenants

Given the discussion above around the very substantial erosion of aviation land, during the first half of the lease term at Moorabbin, Council submits that this area around head lease agreements must be addressed. A transparent and public process should be established that creates a robust process for review by the Commonwealth prior to any lease extension afforded to the ALC over Commonwealth Land. A critical component of lease reviews must be the demonstration by ALCs of the commitment to plan for and actively grow aviation through a clear capital works program. We make these comments with respect to General Aviation. The Victorian Government has recently legislated to introduce a Windfall Gains Tax that comes into effect from 1 July 2023 when rezoning results in substantial value uplift. A very strong case could be put that this is what has occurred for the ALC on Commonwealth Land but a 'level' playing field is not in place to create a similar environment for the non-aviation pipeline of investment at Moorabbin Airport.

A thorough review of the Lease agreements and powers that the Minister has under the Act requires consideration as part of this review. The Green Paper (and ultimately the White Paper) should be able to introduce new initiatives that if carried through to legislation, through revision to the Airports Act, will substantively improve planning practices for airport land across Australia and the leasing (or extending the leasing) of the land is a primary consideration in this regard.

5) Guidance for Practitioners and Developers

We ask that the White Paper gives consideration on how best to communicate aviation planning which is often regarded as a Commonwealth issue through to Local and State Governments and more broader users/stakeholders. It is recommended that a Planning Practice Note is created to give further guidance to planners when making decisions relating to airports. Town Planners for example are not traditionally trained with aviation issues in mind. Many small to medium sized developers would be unaware of Federal legislation when embarking on a development. If that development requires a crane for example, it is seemingly likely that the primary contractors will be unaware of the Airport Regulations that protects intrusions into the Obstacle Limitation Surface (OLS). Planning Practice notes within Victoria provide ongoing advice about the operation of Planning Scheme on a range of planning processes and topics. This assists a planner in making a decision as a regulator. The White Paper should recommend filling this gap and providing a Practice Note or similar to communicate aviation safeguarding to provide basic information about things like noise impacts and the NASF and the process for determining intrusions into the OLS for planners and broader stakeholders.

Kingston wishes to be a constructive participant in the steps to formulate the White Paper and should you require any further information please do not hesitate to contact Sarah Capenerhurst at sarah.capenerhurst@kingston.vic.gov.au or the undersigned below.

Yours sincerely



Jaclyn Murdoch

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